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Building the Ship in Dry Dock: The case for Pre-Independence Constitution-Building in Scotland

ABSTRACT

For newly independent states, constitution-building can be a defining moment: a time when national identities are asserted, values and norms articulated, and founding myths created. The constitution building process is a critical juncture between the divergent paths of stable and well- functioning democracy, on one hand, or persistent instability, coups, repression, and state failure, on the other. But what is the proper relationship of constitution-building to state formation? Should constitution-building occur before or after state formation? Or should the two processes somehow proceed in parallel? To address these questions in a Scottish context, this paper draws on state-formation and constitution-building processes in the Westminster-derived tradition. The paper considers the advantages and disadvantages of these sequences, and discusses the circumstances in which they might be applicable. It concludes by making some tentative recommendations for a pre-independence constitution building process in Scotland.

KEYWORDS

Constitution Building, State Formation, Scottish Independence, Commonwealth, Constituent Assembly, Sequencing

Major-General Lionel Dunsterville, commanding British forces in Baku at the time of the Russian Revolution of 1917, observed in his memoirs that, 'It is extremely easy to break down an existing form of government, but to build up anything substantial in its place is a matter of considerable difficulty [...] and a long period of disorder must ensue during which the best efforts of the best men will not suffice to prevent ridiculous situations from arising.' (Dunsterville, 2012). In states transitioning to independence, the challenge is not solely, or even primarily, to throw off the old order; usually, independence does not arise until that order is already willing to relinquish power or too weak to hold it. Rather, the challenge is to build a new order in its place – a constitutional order that will be enable the new state to govern itself with acceptable legitimacy, stability, inclusion and effectiveness. In the absence of such a constitutional order, situations may arise which are not merely ridiculous, but tragic.

With the aim of avoiding 'Dunsterville's nightmare', this article addresses the question of how to sequence constitution-building and independence. Focusing on Scotland, it is written in the midst of a continuing controversy surrounding the possibility of another Scottish independence referendum. If such a referendum were to be held, and if Scotland were in that event to vote for independence, the question of how to constitute the Scottish state, both in terms of substance and process, would have immediate practical importance. The prescriptive part of the paper is limited to Scotland; constitution-building depends on some many often unique contextual variables that generalizable conclusions about the 'best process' are unhelpful to the practitioner or policy-maker. Nevertheless, the overall argument of the paper (that pre-independence constitution building may be beneficial if circumstances, and particularly the attitude of the relinquishing power, permit) may be applied to other cases of transition to independence, especially if there is a desire to ensure that the new state is rooted in a civic, constitutional nationalism and maintains polyarchic governance.

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The existing literature on constitutional processes primarily focuses on *how* and *by whom* constitutions are made, whether process matters, and the relative importance of elite pacts and public participation (e.g. Hardin, 1989; Ordeshook, 1992; Elster, 1995; Negretto 2013; Saati 2015; Wheatley & Mendes, 2016; Elkins et al, 2009). The question of *when* constitution-making should take place has largely been ignored. Bell and Zulueta-Fülscher (2016) address this in post-conflict situations, but not in countries transitioning to independence. In independence transitions, it is a classic ‘chicken and egg’ problem: a state cannot safely exist without a constitution, which is key to establishing its institutions and its identity, but how can a constitution be made for a state that does not yet exist?

Jon Elster et al (1996: 27) famously likened constitution-building to ‘rebuilding a ship at sea’. The adoption of a new constitution entails reconstructing the ship of state from the keel up, from its basic legal-institutional foundations. At the same time, it must keep on sailing. It must continue, during the constitution-building process, to function as a viable state: to maintain the rule of law and public security, to collect and expend revenues, and to provide public services. This poses a difficult challenge, not least because the period of constitution-building is likely to be characterised by ‘mega-constitutional politics’ (Russell, 1993), during which constitutional change overshadows the rest of political life. It absorbs the energy, passion and political resources of political leaders, while day-to-day issues (education, health, justice, infrastructure, fiscal issues etc) are pushed to the bottom of the political agenda.

Occasionally, peaceful, stable democracies will undertake major constitutional change in non-crisis situations, without violence or institutional rupture: as in Canada before 1982 (Russell, 1993) and Belgium before the adoption of the 1994 constitution (Fitzmaurice, 1996; Covell, 1985; Popelier & Lemmens, 2015). However, constitution-building rarely occurs in such calm waters. It normally happens in response to momentous political shifts, such as regime collapse, a revolution, severe economic troubles, defeat in war, the negotiated end of a civil war, or – most relevant for present purposes – on becoming independent (Elster, 1995). Mega-constitutional politics therefore often takes place not against the backdrop of having to continue with routine ‘governance as usual’, but alongside a host of other challenging institution-building or institution-reforming activities. In the transition to independence, for example, it might be necessary not only to adopt a constitution, but also to establish armed forces, diplomatic and consular services, a new currency, and so forth.

In the transition to independence, these difficulties are multiplied. Newly independent states have a long to-do list, spanning everything from tasks like issuing passports, adopting a currency, and opening embassies, to more general objectives like achieving broad public legitimacy. For some countries, meeting all those challenges at once could be overwhelming. States facing multiple demands beyond their capacity to deliver are in danger either of becoming a state or falling into authoritarianism. Certainly, independence does not always lead to democracy, peace and prosperity.

This article, drawing on the experience of British decolonisation, argues that there is a strong case for pre-independence constitution-building in Scotland. This enables constitution-building and the transition to independence to be disentangled – so that the activities become sequential rather than concurrent. It could be likened to ‘building a ship in drydock’. There are two main advantages to pre-independence constitution-building. The first is that there is no dangerous ‘Dunstervillian gap’, during which the constitutional order of the old system has been sundered, but the new one has not come into effect. There is scope for an almost seamless constitutional transition. The second is that the new state, because its constitution has been agreed and adopted

in advance, does not have to go through the choppy waters of ‘mega-constitutional politics’ while still navigating through the tricky (economic, institutional, diplomatic) narrows of independence.

The remainder of the paper is divided into four sections. The first sets the discussion in a Scottish context, outlining the constitutional policy of the Scottish National Party (SNP). Section Two discusses the functions of a written constitution, particularly (although not exclusively) in a newly independent state, and the requirements (from a normative but realistic perspective) of a constitution-building process. The third section examines pre-independence constitution-building processes: how they are structured, their strengths and weaknesses, and the contexts in which they are appropriate. The fourth section looks at the alternative – a post-independence constitution-building process – and likewise considers its pros and cons. The paper concludes by returning to the Scottish problem and considering how pre-independence constitution-building, despite its limitations, may be advantageous in any future re-run of the independence referendum.

The paper draws primarily on Commonwealth examples from the decolonisation era. Clearly Scotland is not in any traditional sense a colony, and Scotland today is very different, in terms of size, economic development, and democratic experience, from India and Pakistan in the 1940s or the Commonwealth Caribbean in the 1960s. Nevertheless, this is not as strange a choice as it might seem. These Commonwealth countries share the common factor, relevant for the purposes of this article, of having become independent from the United Kingdom. Assuming that the United Kingdom would respect the result of any future independence referendum and if necessary support a peaceful and orderly transition, there are clear potential similarities between Scotland and those decolonisation cases; this applies both to the design of the constitution-building process and to the continuingly relevant legacies of the ‘Westminster Model’ as a normative basis for a viable and acceptable constitution (Patapan, Wanna and Weller, 2005).

For the purposes of this article, a *written constitution* is defined as a ‘supreme and fundamental law’. It is supreme in the sense that it is harder to amend than ordinary law and prevails over ordinary law in case of incompatibility. It is fundamental in that it deals with fundamental rights, principles, and institutional structures. Such a constitution is found in the majority of the world’s democracies, including in the rest of Europe and most of the Commonwealth. *Constitution-building* is the complex process of developing, drafting, adopting and implementing a written constitution. *Constitution-making* is the crucial phase of the constitution-building process during which arguing and bargaining takes place (within the bounds defined by the overall process design). The *constitution-making body* is the institution, mandated as part of the *constitution building process*, to perform the task of *constitution-making*; it may be a Constituent Assembly, a Constitutional Commission, a Constitutional Conference, parliamentary constitutional review committee, or some other body.

Finally, this paper does not argue for or against Scottish independence. My own views on that subject have never been hidden and need not be repeated here. Neither does the paper argue explicitly for or against a written constitution. There may be reasonable theoretical and practical arguments, in an old democracy, for relying instead on parliamentary sovereignty and conventions, tempered by the self-restraint of the politicians. I remain unconvinced by those arguments, but that is not the subject of this paper. In practical terms, if Scotland decides to become independent, it will not be faced with the question of *whether* to write a constitution, but *how* – and crucially *when*.

I. Scottish Constitutional Proposals

The SNP, the main pro-independence party in Scotland, has long publicly committed itself to the principle of a written constitution for an independent Scotland (Bulmer, 2011; 2016). The party adopted a draft constitution for Scotland in 1977, and reissued this, with minor changes, over the years. The fullest constitutional policy statements were published when the party was still in opposition: *A Free Scotland* (SNP, 2002) and *Citizens, not Subjects* (SNP, 2005). These constitutional proposals contained some features that by British standards would be novel (Bulmer, 2011), but little thought seems to have been given as to how the constitutional transition would be sequenced.

The assumption implicit in these policy papers is that the draft constitution would be published ahead of the independence referendum and linked to the outcome of the vote, such that in voting for independence the people would also be endorsing the proposed constitution. There would have been no real constitution-building *process*, just a mechanism for constitutional adoption. Of course, getting the necessary enabling legislation through the Scottish Parliament might have provided opportunities for the draft constitution to be debated, challenged and perhaps amended before being finalised, while the need to win a referendum would have acted as a ‘downstream constraint’, in Elster’s (1995) terms, encouraging the Scottish Government to be sensitive to what public opinion would accept. Even so, it would be democracy only in a minimal, majoritarian way.

In government (minority 2007-2011; majority 2011-2016; minority 2016-), the SNP recoiled from this approach. In private conversation, several Ministers and members of the Scottish Parliament voiced concern that the independence vote could be a hostage to specific constitutional provisions; they wanted to maximise the broadest possible support for independence by keeping divisive constitutional issues off the agenda until after independence.

In summer 2014, the Scottish Government published a draft Interim Constitution (Scottish Government, 2014-A). This short, minimal document was intended to act as a basic ‘constitutional platform’, which, together with the existing Scotland Act and other institutional statutes, would provide the legal and institutional basis for the foundation of an independent Scotland (Bulmer, 2016; Scottish Government, 2014-B). As a transitional text, it was not entrenched against unilateral amendment by ordinary legislative majorities and lacked the institutional detail expected of even the most basic constitution. Instead, it contained provisions (section 33) for the development of a written constitution for Scotland by means of a ‘Constitutional Convention’, to be organised by an Act of the post-independence Parliament of Scotland.

In the event, independence was rejected in the referendum held on 19 September 2014. It is doubtful whether the content of the draft Interim Constitution swung many votes either way. But clearly the SNP and the wider ‘Yes’ movement failed to reassure a majority of the Scottish voters that independence was a ‘safe bet’. The SNP failed to understand, and so to present, independence as a state-building project with constitutional democracy at its core. The White Paper elided the choice of a new constitutional order with the policy preferences of the SNP in the first Parliament of an independent Scotland (Scottish Government, 2014-B), thereby fusing state and party in a way that has elsewhere has been corrosive of constitutional democracy. If an independent Scotland is to be a flourishing polyarchy rather than a competitive (or even non-competitive) authoritarian state, and if it is to be rooted in a civic-democratic rather than ethnic sense of nationalism, then these constitutional issues cannot be overlooked. There is a need for a deeper understanding not only of the content of a future constitution, but also of the process by which the constitution is developed.

II. Constitutions and Constitution-Building in Transitions to Independence

Written constitutions in democracies perform various functions (Ghai, 2010:3). Many of these are relevant to all countries, including long-established states. There are certain functions, however, that are especially important during the transition to independence. These can be considered under seven headings: Authority, Signalling, Inclusion, Institution-Building, Reassurance, Certainty and Recognition.¹

The first function of a written constitution is to establish the state's claim to **authority**. The constitution generates legitimate, stable, inclusive and effective authority by providing legal-institutional basis for the depersonalisation of power; it instantiates and generalises power, separating the authority of the government-of-the-day, or of any particular party or person, from the authority of the state-as-such (Thornhill, 2011).

Achieving such authority requires a state to set out and to justify the nature of the regime, the basic values which will motivate and legitimate it, and the broad goals it will seek to pursue. This is '**signalling**'. Constitutions perform this function with varying degrees of both detail and explicitness. Some leave such things to be inferred from the substantive and structural provisions of the text (e.g. Canada, The Netherlands); others provide an ideological or historical justification for the state as in the 2011 Constitution of Hungary, with its 'national avowal' (Toth, 2013). In any case, the constitution of a country transitioning to independence can serve as a 'prospectus' for the new state: it lets its citizens know what *kind of state* they are to be part of. While this function may be performed by other quasi-constitutional documents, such as the Declaration of Independence in Israel (Navot, 2014), only the constitution can give legal effect to such a prospectus, translating political promises into a form that both binds and bounds the state's claim to legitimate power.

Ensuring **inclusion** in the new political order is another of the functions to be emphasized by constitutions in states transitioning to independence. At present, the question of independence divides the Scottish population into *nationalist* and *unionist* camps. If independence happens, this division will lose its salience. All Scottish citizens will then have an interest in stable and legitimate democratic institutions, freedom of political debate and opposition, free and fair elections, the protection of fundamental rights, and in the honest and competent administration of public affairs. Those basic foundations should unite, not divide. The constitution of a newly-independent state, therefore, should be an inclusive instrument that protects, recognises and empowers all its citizens.

Inclusion may require the constitution to embody and enshrine strategic 'deals' done in the process of state-creation – deals without which legitimate stable authority cannot be sustained. Often this takes the form of sharing power between the centre and periphery, or between founding peoples. It might involve protecting the identity and autonomy of particular minority communities whose inclusion is a prerequisite for the successful achievement of independence in the first place. In a Scottish context, the decision to keep the monarchy after independence could be seen as an attempt to include Unionists and to reconcile them, through the Crown, to a new Scottish state.

Constitutions create and regulate **institutions**. Some countries, like Scotland, already have a set of working institutions, exercising real if limited powers of self-government: there is a Scottish Parliament, Government and judiciary, as well as institutions like the Public Services Ombudsman, the Auditor-General, and the raw material for a Scottish civil service. In these contexts, the role of a written constitution is not so much to create these institutions as to defend and preserve them, by defining the limits of ordinary legislative power in relation to them. The constitutional

¹ For an earlier and less well developed list, from which this is derived, see Bulmer, 2018.

amendment rule, which prevents the Government, backed by an ordinary majority, from easily or unilaterally changing the fundamental institutional structure, is a key constitutional design choice.

This brings us to **reassurance**. Transition to independence is a fraught moment in a nation's history. Supporters of Scottish independence, especially on the left, have tended to emphasise the transformative, aspirational potential of a written constitution. The Scottish Government's 2014 draft Interim Constitution, for example, contained provisions on environmental rights and a ban on nuclear weapons (Scottish Government, 2014-A). The constitution can contain such 'covenantal' provisions (Bulmer, 2015), but these are perhaps secondary benefits. Primordially, a constitution must be a defensive document, which provides legal **certainty** and continuity, prevents governments from abusing power by undermining rights or manipulating the rules. Before a constitution marks out a path towards a better society, it must first provide guarantees that things will not get worse.

Finally, the constitution of a state transitioning to independence is an instrument for the achievement of international **recognition**. An old, long-established state might be able to muddle through without adopting a written Constitution, but it would be much harder for a new state to be taken seriously in the international arena without a written constitution. Moreover, there is an emerging framework of regional and international supra-constitutional law to which states must adhere if they are to claim democratic legitimacy in the eyes of the world (Law & Versteeg, 2012). The constitution is a way of showing, to an international audience, that a newly independent Scotland is sincere about its commitments to democracy. This is especially important in the eyes of institutional gatekeepers such as the Venice Commission, which sees itself as the guardian of 'European values' (democracy, human rights and the rule of law); without a written constitution, Scotland would not meet today's EU accession criteria, or even gain EU Associated State status.

The primary advantage of having the constitution agreed before independence, and ready to come into effect on independence day, is that it avoids any gap between the old order and the new, during which the state could be very vulnerable. In this gap, many newly independent countries have fallen into authoritarianism, or even civil war and state failure, because they have not achieved an initial consensus on the constitutional basis of the political system. One might compare, for example, Argentina and Brazil in the mid-19th century (Gargarella, 2010), post-independence Indonesia and Malaysia (Butt & Lindsey, 2012; Harding, 2012), Zimbabwe and Botswana in the 1980s (Darnolf, 1997), and Bulgaria and Ukraine since the 1990s (Smilov, 2013; Choudhry, Sedelius and Kyrychenko, 2018; Wolczuk, 2001) as pairs of counties in which the presence or absence of consensus on the constitutional order led to different trajectories of institutional consolidation or disintegration.

This is not an excuse for rushing. There is a need both for technical quality (coherence, clarity and completeness) and legitimacy. To ensure quality, most constitution-building processes include 'experts', such as constitutional advisors, legal drafters and academics. To ensure legitimacy, the constitution must be rooted in both elite consensus and popular approval, although there is an on-going debate on how the constitution-building process should be structured, and particularly on the benefits, effects and limitations of elite pacts, on the one hand, and public participation, on the other (see: Elkins et al, 2009; Saati, 2015; Wheatley & Mendez, 2016).

Constitution-building is therefore a co-operative activity involving 'experts' (technical support and advice), 'elites' (doing the hard bargaining) and 'everyone' (the general public, whose approval is necessary for legitimacy). A constitution-building process should engage these different groups and to apply their contributions at the appropriate points. For example, the public might

typically come in at the beginning of a process in setting broad objectives (through the election of the constitution-making body), and in approving the final constitution (such as by means of a referendum). Political elites might be engaged in the institution-forging arguing and bargaining stage – the crunch point of the process where deals are done (Negretto, 2013) – and also in the implementation stage. The experts might dip in and out to advise and inform at various stages.

Additionally, ‘externals’ may be relevant actors. As discussed above, that Scottish constitution would have to comply with liberal-democratic norms if it is to win approval in Europe, and the Venice Commission could act as a powerful ‘downstream constraint’. The strategic, military or economic interests of powerful neighbours may also constrain constitutional choices. Scotland might have to abide by agreements with Westminster reached during the process of independence, which have to be written into the constitution; there are precedents for this in the way the Anglo-Irish Treaty was integrated into the Irish Free State constitution.

The sequencing of constitution-building and independence might have important practical consequences for the design of the process as a whole. The choice of when to write the constitution – before or after independence – can open some doors, in terms of the form that the constitution-making body takes, its inclusivity, its openness, or the upstream and downstream constraints by which the constitution-making body may be bound. It is no coincidence, as will be explored in the next two sections, that pre-independence constitution-building in the Commonwealth has often relied on a Constitutional Conference, consisting of elites and experts, while post-independence constitution-building processes have tended to rely on elected Constituent Assemblies.

III. Pre-Independence Constitution-Building in the Commonwealth

Pre-independence constitution building became a standard pattern for British decolonisation in the 1960s, 1970s and 1980s. It was widely adopted in Africa, the Caribbean and the South Pacific. The details varied with each case, but the process would typically begin with pro-independence parties winning a majority of seats in the colony’s legislature. The Chief Minister, or other responsible leader of the legislative majority, would then formally apply to the British for independence. A Constitutional Conference would be convened – normally at Lancaster House in London - to which the leadership of the main political parties (Government and Opposition) would be invited. In some cases, representatives of major interest groups, such as the chiefs in Botswana (Mokopakgosi, 2008) or white settlers in Kenya (Report of the Kenya Independence Conference, 1963), would also participate – although direct public engagement, of the sort seen in today’s constitution-building processes, was minimal to non-existent.

The Constitutional Conference would produce a report, outlining a draft ‘independence constitution’ and setting the date for independence. An Independence Act would then be passed by the United Kingdom Parliament, with the text of the new constitution, as agreed by the Conference, issued as an Order-in-Council under the terms of the Act. On the appointed day, the military band would play ‘God Save the Queen’, the Union Flag would come down, the ‘constitutional instruments’ would be handed over, and the new national flag would go up to the sound of the new anthem. There would – in principle – be no gaps between the old order and the new, no period of legal uncertainty, no fraught period of mega-constitutional politics.

The choice of a Constitutional Conference as the main constitution-making body is a natural – although not inevitable – consequence of a pre-independence constitution-building processes. In

such cases, there is presumably a legislature already in existence to manage those functions over which the jurisdiction, although non-sovereign, has self-governing powers. That legislature is likely to possess a relatively high degree of democratic legitimacy; equally, it will contain the main political leadership, who will not wish to be challenged or overshadowed by another elected, parallel body claiming constituent power.

The presence of the British officials in these constitution-making processes disqualified the pre-independence constitutions from being the work of a sovereign national constituent power. However, it would be wrong to assume that these were simply imposed constitutions. Colonial Office officials hosted these Conferences, chaired them, and supported them with legal advice and secretariat functions. Sometimes they intervened to protect what they perceived to be British strategic or economic interests, and sometimes to ensure fair play and to lead the parties towards a more balanced constitutional settlement. In many cases, for example, the British actively supported the adoption by newly independent countries of bills of rights (Parkinson, 2008). Yet genuine negotiations took place between the national political parties and the constitutions often did reflect public opinion, or at least the consensus of national elite opinion.

Such national participation goes some way to addressing issues of democratic legitimacy arising from pre-independence constitution-building. Andrew Arato (2016: 93-97) notes that the legislature of an outgoing regime (in these decolonisation cases, the British Parliament) may be a legitimate constitutional actor when it is simply giving legal effect to political agreements that are perceived as legitimate by being arrived at through a round-table negotiation; the Constitutional Conference provides the necessary political legitimacy, while the Westminster Parliament simply provides the necessary legal authority.

Moreover, the national politicians at Constitutional Conferences did not have an entirely free hand. Often they were constrained by domestic public opinion, either through up-stream elections held before the Constitutional Conference to give a mandate, or through down-stream elections in which the parties would have to justify their actions to the people. In some cases (e.g. Malta) a referendum was also held on the final constitutional settlement. As Martin Henry (2017) argues in relation to the constitution of Jamaica, it was not 'pre-fabricated' nor merely 'handed to' Jamaica by the British colonial authorities, but 'made by Jamaicans for Jamaicans'.

The greatest advantage of pre-independence constitution making in post-colonial contexts is that it addresses the need for reassurance and certainty. The terms of independence and the forms of government under which the independent state would operate, as well as the rights of its citizens and any special guarantees to minorities, are known before independence day. Indeed, the initial decision to become independent cannot come into effect until constitutional terms are agreed.

These pre-independence constitution-building processes also helped to address the issues of authority and institution-building. In many cases (not all) the Crown was retained at independence. Whatever may be the arguments for or against monarchy in the abstract, keeping an established locus of authority may have helped some newly independent states to avoid the dissolution and disintegration which might occur in the absence of such authority. Similarly, Acts of the British Parliament or Orders-in-Council could provide for continuity of government during the transition.

Pre-independence constitution-building is not always a viable option. It presumes, above all, the goodwill of the colonial or other overseeing power. The UK has a long history of granting independence to countries. In some cases, the UK actively resisted independence, through various combinations of military force, selective repression and political influence, until it was finally forced

to reach an agreement. In others – such as some Caribbean and South Pacific nations in the late twentieth century – the UK actively supported moves towards independence. In general, however, the UK Government accepted incremental extensions of self-rule, and once independence became inevitable sought to manage rather than resist the transition. If that goodwill is not present, or if the metropolitan power has lost legitimacy, to the point of not being trusted as a negotiating partner, there is little scope for constitution-building to take place while it is still in overall charge; only a post-independent process, operating in conditions of sovereignty, is likely to be accepted.

Secondly, pre-independence constitution-building is difficult when the question of whether to become independent is still unsettled. In such circumstances it can be difficult to achieve the necessary inter-elite consensus and public agreement on the constitution of a new state. Those who oppose independence have an incentive to make independence seem as risky and uncertain as possible, and they are likely to boycott the process, or act as spoilers, rather than constructively engaging in the process. Only once independence is an inevitability can Unionists begin to think in terms of how (not whether) an independent state should be established; only then are they likely to get involved in substantive constitutional negotiations. This does not necessarily rule out pre-independence constitution-building, but it does make it less inclusive if it occurs before that tipping point is reached.

Thirdly, there is the issue of timing. The danger of post-independence constitution-building is that it might take a long time – as in Pakistan – for a constitution to be produced, or even result in the whole constitutional project being shelved – as in Israel (Lerner, 2011; Navot, 2014). The danger in pre-independence constitution-building is that it will be too hasty. Delays in the process of agreeing the constitution may delay independence. This can provide a powerful collective impetus to reach agreement – especially where there is already a consensus around the desirability of independence and discussion only of its terms. However, it can also result in excessive pressure to rush the process and to reach only superficial agreements – this can result in vague or incomplete constitutions, which correlate with short expected constitutional endurance (Elkins et al, 2009). There is also likely to be less time for public engagement in the process – a deficiency for which a confirmatory referendum at the end of the process is no substitute (Wheatley & Mendes, 2016).

Finally, the choice of pre-independence constitution-building has implications for the sort of constitution that can be produced. Because of the pressures inducing the choice of a relatively small, elite and expert-driven Constitutional Conference, the potential involvement of ‘imperial’ authorities, the compressed timescale with independence as its end goal, and limited opportunities for direct public engagement, constitutions emerging from pre-independence constitution-building processes are likely to be more conservative (small-c) in nature. Radical constitutional innovation may be stifled. Whether this is a good or bad thing depends on the context and one’s point of view, of course, but for those who see constitution-building as an opportunity for radical change, pre-independence processes may seem unduly limiting.

IV. Post-Independence Constitution-Building in the Commonwealth

In the Commonwealth, India and Pakistan are the most important examples of post-independence constitution-building. The Indian National Congress had committed itself to a post-independence Constituent Assembly as early as 1935. This was accepted by the British in the ‘August Offer’ of 1940, reiterated by Sir Stafford Cripps in 1942, and given concrete form in the Cabinet Mission

Plan of 1946 (Singh, 1990). The work of constitution-building in India began in 1946, before independence, but the failure of the Muslim League and the Indian National Congress ('Congress party') to reach agreement resulted in both India and Pakistan becoming independent in 1947, before either country had completed its constitution. The Indian Independence Act 1947 conferred legislative powers on the Constituent Assemblies of India and Pakistan, which became sovereign constituent bodies in Arato's (2016) sense that they were not constrained by any higher law.

Post-independence constitution-building had the advantage of establishing a legitimate, national sovereign authority without interference from the former imperial power. From the point of view of a national liberation movement like the Congress party, this offered the ability to devise a truly sovereign constitution, rather than to receive a constitution pre-formed for them or imposed on them by the British. The Indian Constitution was agreed by Indians amongst themselves – not negotiated between Indians and the Colonial Office. The British could not wield a veto power over the constitution by threatening to postpone independence, because independence had already been granted. However, the basic constitutional forms and fundamental constitutional ideas were still indirectly influenced by the former colonial power, both in terms of historical path dependency, and through the more subtle but pervasive mechanisms of influence amongst elites, such as socialization and education (Austin, 2000; Galligan and Versteeg, 2012).

A post-independence process encourages the use of a Constituent Assembly as its primary constitution-building body. Having declared independence on terms that are still open and unresolved, the establishment of an elected Constituent Assembly provides a basis for inclusion and democratic legitimacy. There needs to be a parliament in the new country – and that parliament, once it has been elected and seated, might as well do double-duty as both interim legislature and Constituent Assembly in which all the high drama of mega-constitutional politics played out.

Constituent Assemblies can play an important signalling role, declaring and forging national identity. Being a sovereign and inclusive body, the Constituent Assembly of India (despite its indirect election by provincial legislatures) could seize the opportunity for a fresh start, for a transformative 'constitutional moment' in which higher law-making, as Bruce Ackerman (1991) would describe it, could take place. The Constituent Assembly could be an authentic expression of national identity and pride. In the words of Jawaharlal Nehru, it represented:

'a nation on the move, throwing away the shell of its past political and possibly, social structure, and fashioning for itself a new garment of its own making. It means the masses of a country in action through their elected representatives. It has thus a definite revolutionary significance.' (Nehru, 1988: 17).

India's Constituent Assembly has captured a place in the national political imagination. It shows how a post-independence process can enable national founding to be expressed through a distinct constitutional moment, which becomes part of a nation's political mythology and historical legacy. Certainly, the Indian Constituent Assembly has a bigger role in the national story and in the legitimation of constitution than, say the independence conference in a country like Jamaica.

There is, on the other hand, no guarantee that things will proceed so smoothly. Pakistan's delayed and interrupted constitutional process provides a warning counterpoint to the Indian experience. It took nearly a decade after independence – until 1956 – for Pakistan to give itself a constitution, and in the decades which followed it proved difficult to maintain a consensus at both elite and mass levels around any constitutional settlement, or even, considering the independence of Bangladesh, to maintain agreement about the boundaries or identity of the state itself (Waseem,

2015). Pakistan's experience highlights the biggest risk of post-independence constitution-building – that a country, having becoming independent without first building a workable consensus around a given constitutional order, may suffer from a crisis of authority – ‘Dunsterville’s nightmare’ - be plunged into an abyss of civil war, military coups and cyclical dictatorships. From such a torn fabric, it is very hard to rebuild legal, democratic institutions.

Judged against the criteria of certainty and reassurance, the process in both India and Pakistan was wanting. Because the Constituent Assemblies were legally sovereign there was no guarantee, at the moment of independence, of what sort of constitution would result. In India, under the leadership of Nehru and the Congress Party, aided by individuals such as B. N. Rao and B. R. Ambedkar, this had few if any ill effects. In Pakistan, however, the constitution that emerged differed greatly in tone and substance from that which the leaders of the Pakistan independence movement had promised beforehand: Muhammad Ali Jinnah had promised a secular constitution for a Muslim-majority people, but the Objectives Resolution adopted by the Constituent Assembly in 1949 set out a vision of an Islamic republic at odds with that promise (Hirschl, 2010). A politician's promise, before independence, is no guarantee of a subsequent constitutional outcome.

V. Conclusions and Application to Scotland

It would be premature and misguided to conclude that a pre-independence approach is necessarily the best course of action in all circumstances. As has been argued, much depends on the attitude of the relinquishing power, and whether it will facilitate or obstruct a constitutional path to independence. Nevertheless, one can make a tentative presumption in favour of pre-independence constitution-building if circumstances permit. If a country becomes independent without a reasonably sound and robust constitution in place, it would be dangerously exposed to the risks of authoritarian backsliding, corruption and incumbent manipulation. The government in office on day one of independence would have, at that point, every incentive and opportunity to bend the rules of the game to its own advantage – manipulating electoral laws, or eroding associative liberties, or restricting media freedoms – in ways that result in the sort of ethno-nationalist and competitive (or non-competitive) authoritarian state that the opponents of independence fear.

This is not only a problem for Scotland, but neither is it a problem from which Scotland is exempt. It is a near-universal risk to which newly formed states are exposed. In this respect the normality of Scotland – the fact that Scotland, like other newly independent states, would have no guarantee of democratic success in absence of a broadly agreed constitutional order - is emphasised. If there is any heightened risk, it comes from Scotland's oil and gas resources; authoritarian populism, state capture by rent-seeking oligarchs, foreign intervention, and the chronic under-development of non-extractive economic sectors are some of the risks to which resource-rich states are especially vulnerable (Frankel, 2012).

The constitution cannot be a panacea. Neither is it the only determinant of democratic success; there are economic, social and cultural, as well as institutional, explanations for democracy (Huntington, 1993; Inglehart & Welzel, 2005; Acemoglu & Robinson, 2012). Nevertheless, placing the legal foundations of institutions in a constitution is almost everywhere regarded as a normal and necessary basis for a stable, legitimate democratic state. Having a constitution ready to go on independence day, rather than scrabbling about in the years immediately following independence when so many other economic and policy issues have to be addressed, would help avoid

'Dunsterville's nightmare'. It would go a long way towards ensuring that an independent Scotland would be both a 'civic' state (in which all enjoy equal rights-based citizenship, regardless of race, religion or origins) and a 'polyarchic' state (where public power is exercised through inclusive and contestatory democratic processes). If Scottish independence were merely an ethnic project, perhaps this would be of secondary importance, but to an independence movement that is predicated on a civic and democratic form of nationalism, the constitution is primordial.

A decolonisation-era 'Constitutional Conference' might not map perfectly onto current (or foreseeable) Scottish conditions, not least because of the potentially unhelpful attitude of the UK Government and the spoiler role of Unionist parties. Under the current Conservative Government at Westminster, constructive engagement is doubtful; this might change if, for instance, a future Labour Government were to be dependent on SNP votes in the House of Commons. Even in the absence of support from the UK Government, an attempt could be made to develop a draft constitution which at least represents a consensus amongst those who are open to independence.

A Constitutional Conference might replicate the partial, but sufficient, consensus achieved around devolution by the Constitutional Convention in the 1990s. One might imagine a body, organised on the basis of an Act of the Scottish Parliament, containing any political parties willing to participate alongside the pillars of Scottish civil society – churches, trade unions, professional associations, local authorities etc. Contentious issues arising from the Constitutional Convention might even be referred to a Citizens' Assembly, showing that pre-independence constitution need not exclude public participation. The draft, once approved by the Constitutional Convention and the Citizens' Assembly, could then be adopted as a schedule to any future Independence Act.

A constitution adopted in this way need not involve major institutional innovation; it could mainly be an exercise in codifying and entrenching – and thereby protecting from unilateral change – the institutions and rights that currently exist in Scotland by statute, with such alterations as may be necessary for an independent state. The resulting constitution might look quite similar to British-derived 'Westminster Export Model' constitutions (de Smith, 1961), although incorporating those reforms already adopted in Scotland under devolution (such as proportional representation, fixed term Parliaments, and the formal election of the First Minister by a vote of the Parliament).

The usual limitation of pre-independence constitution-building is that it results in a moderate constitution, transferring rather than transforming power. In Scotland, the opposite danger arises: insufficient inter-elite inclusion may produce an excessively radical text. Without the presence of conservative Unionist voices, the resulting constitution might be more of a wish-list or manifesto than a broad agreement on the legal-institutional basis of the state. Such one-sided constitutions may be short-lived (Elkins et al, 2009). Just as it is vital to lay solid foundations, it is folly to pander to one's own supporters while building castles in the sky. To guard against this, the constitution-making body's statutory terms of reference should be clearly defined, and there should be a strong secretariat to act as a source not only of expert advice, but also of caution and moderation. More radical demands might be met by a commitment, hard-wired into the text of the constitution, to future review, once the dust of independence has settled and the institutions of the new state have had time to bed-in. This would resemble a staggered, multi-stage, 'post-sovereign' process (Arato, 2016). In that way, openness to inclusion and innovation in the post-independence phase would not undermine guarantees and assurances established at the pre-independence stage.

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